n
d
.
e
s
e
s
e
n
n
e
d
e
d

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947

No. 278

ROGER TOUHY,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

EDGAR B. TOLMAN,
THOMAS I. MEGAN,
HOWARD B. BRYANT,
Attorneys for Petitioner.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0563

SUBJECT INDEX.

Brief.

Cases Cited.

Statutes.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947

No. 278

ROGER TOUHY,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I.

NO FACTUAL CONTROVERSY.

The opposing brief for the Illinois Attorney General raises no controversy as to questions of fact. With commendable frankness he indicates in the first paragraph of his brief his substantial acceptance of our allegations of fact. He refuses to re-state the facts and states his purpose to be "merely to state in summary fashion those facts that fairly delineate the questions that petitioner seeks to present in this court."

II.

CONTROVERSIES AS TO THE LAW.

The opposing brief points out no particular in which petitioner has failed to exhaust every remedy available to him under Illinois law. Indeed, counsel for Illinois say (p. 2, par. 3) "Illinois concedes that under her mode of judicature, *habeas corpus* is not an appropriate means of asserting matter *dehors* the record of original conviction unless such matter was known to the trial court at the time that sentence was imposed. Therefore Illinois draws no conclusion adverse to petitioner from the fact that he has been denied a hearing upon *habeas corpus* in Illinois." They do, however, present many controversies as to the law of this case. Some of these controversies are in definite form. Others are merely implied by the form of statement.

In the first paragraph on page 3 of the brief in opposition counsel for Illinois imply an error on the part of petitioner's former counsel, in that, this action had been brought by filing a petition and not by a mere motion.

Counsel for Illinois seem not to appreciate the reason for resorting to the method of procedure at common law.

The choice of the older form of procedure was not inadvertent. It was deliberate. It was in harmony with the contention of petitioner's former counsel that the statute abolishing the old and substituting a new form of procedure for the old writ of error *coram nobis* was applicable only to civil actions and not to criminal cases. Without repetition the court is referred to what has been said on that subject in Mr. Megan's suggestions in support of the petition for writ of error *coram nobis*. (R. pp. 17-19)

III.

JURISDICTION.

In the argument of counsel for Illinois at page 9 of their brief in opposition the point is raised that the Illinois Supreme Court decision rests upon adequate non-federal grounds and that therefore this court lacks jurisdiction to review.

That point would have required consideration if this case were now before the court only on non-federal grounds. The error *coram nobis* proceeding rests upon Federal grounds namely, that the verdict of the jury and the judgment of the Illinois courts was vitiated by the admission of perjured testimony in violation of petitioner's right under the Constitution of the United States. The Supreme Court of Illinois in affirming the judgment of the Criminal Court of Cook County on the ground that the introduction of perjured testimony is not permissible in an error *coram nobis* case under the law of Illinois, has denied the petitioner relief for his unlawful imprisonment in violation of the Federal Constitution. That ground is certainly a Federal ground of decision. Since all state remedies have been exhausted and no remedy under state law remains, this court has jurisdiction to enforce the Federal rights which Illinois has refused to recognize.

IV.

ALLEGED LACK OF VERIFICATION.

Counsel for Illinois claim that the petition in the *coram nobis* case is highly argumentative and urges its rejection because not supported by affidavits other than that of petitioner. No reason is given why the

verification of that petition by the petitioner himself is not a sufficient verification for the purposes of this proceeding.

It is important here to remember that a demurrer was filed to the petition and that the demurrer was sustained in the Criminal Court and that the action of the Criminal Court was affirmed by the Supreme Court of Illinois. A demurrer admits all allegations of fact well pleaded. The application of this ancient rule is not to be brushed aside by so vague an assertion as that the petition is "highly argumentative."

It is also urged that no excuse is given for not furnishing the affidavit of Mr. McConnell to Factor's confession. Can it be seriously urged that when a verified petition has been demurred to, and the demurrer sustained, and the proceeding dismissed, there is any burden on petitioner to explain the absence of other proof of the truth of the petitioner's averments? Why should it be necessary to give additional support to a petition admitted by demurrer? However, Mr. Charles P. Megan in his "Suggestions" in support of the petition for writ of error *coram nobis* pointed out the natural reluctance of an attorney voluntarily to disclose matters stated by Factor to him when Factor was conferring with him as one seeking to employ him as his lawyer. Service of a subpoena on McConnell would have been a futile act. It would have had no compelling force until the action came on for hearing. The state by filing its demurrer and the courts of Illinois by sustaining the demurrer made impossible a trial on any question of fact.

Opposing counsel also contend that "highly argumentative" statements are not entitled to be considered as supported by the statements in Mr. Charles P. Megan's "Suggestions" in support of the petition in the *coram*

nobis proceeding. We have already pointed out that a member of the bar, as an officer of the court, is amenable to more severe sanctions for what he says as an officer of the court than he would be for statements verified by his affidavit. (Petitioner's Brief pp. 31-32).

The Illinois Supreme Court also said that the allegations of the petition for writ of error *coram nobis* were "hearsay" statements of the highest degree. Those allegations in the petition were supported by Mr. Charles P. Megan's "Suggestions." On page 31, par. 3 of our original brief in this proceeding, we also answered the "hearsay" fallacy and point to the analogy of an "offer to prove". The allegations of any pleading setting up what a witness will say on the trial necessarily partake of the character of hearsay evidence. A pleading which states what will be said on the trial by witnesses, and counsel's offer to prove what witnesses will say on the trial, have never before been held to be objectionable as "hearsay".

V.

AN UNTENABLE TECHNICALITY.

Counsel for Illinois contend that "the entire Illinois Supreme Court record is not before this court", and that since the error *coram nobis* proceedings are part of the original proceedings on which petitioner was convicted, this court cannot review any part of the record. This seems to be an unreasonable attitude based on highly artificial reasoning. This proceeding involved the newly discovered evidence of Factor's perjured testimony and its vitiating effect upon the verdict. Counsel points out no particular of what they consider to have been omitted portions of the original case which would be applicable

to the narrow issue here presented. The statute referred to by counsel for Illinois, abolishing the writ of error *coram nobis* does not declare that the motion must be made in the original proceeding. It only requires that the motion be made in "the court in which the error was committed." (Illinois Civil Practice Act, Sec. 72, R. S. Ill. Chap. 110, Sec. 196. Our petition and brief foot-note p. 8.) The Supreme Court of Illinois in the opinion rendered on the appeal of the error *coram nobis* case said that the "motion or petition is the filing of a new action." (*People* v. *Touhy*, 397 Ill. 19, 25, Petitioner's Brief p. 16.)

VI.

OFFICIAL COMPLICITY.

Opposing counsel contend that even if one is convicted upon perjured testimony, he has no remedy unless there was "official complicity in the subornation or presentation of the perjury". The decisions of this court and those cited in the opposing brief do not support that broad statement. How can it be contended that one who has been imprisoned in consequence of perjured testimony has no remedy unless the prosecuting officers suborned the perjury, or participated in its introduction with knowledge of its falsity? The perjury is the real wrong. It influences the verdict just as much whether the prosecuting authorities knew of its falsity or believed it to be true.

That unjustified assumption of opposing counsel probably arises from the fact that in some of the cases dealing with the effect of the introduction of perjured testimony it was remarked that the perjury impeached the verdict "particularly where the prosecuting officers knew or ought to have known that it was false." This point was fully

dealt with in *Jones* v. *Kentucky*, 97 F. 2d 335, 338 (1938) cited and quoted from at length in our original brief at page 36.

Without retiring from the position just taken perhaps the Court should be reminded that the petition recites that the representatives of the State charged with the prosecution of the petitioner caused or allowed the perjured testimony to be introduced in evidence on the trial knowing or with reasonable means of knowing that the testimony was false. (R. 11) How could any public prosecutor fail to know that the testimony of Factor, Prince of Swindlers, was unworthy of belief?

VII.

OPPOSING COUNSEL'S CITATIONS.

Because *Woods* v. *Nierstheimer*, 328 U. S. 211, is so completely controlling in the instant case, and because *Jones* v. *Kentucky, supra,* so completely supports the proposition that official complicity is not an essential where perjury vitiates the verdict, we will not burden this Court with a review of each of the many cases cited by counsel for Illinois. None of them parallel this case and all of them are believed to be distinguishable. We may however be permitted to illustrate by pointing to *Lisenba* v. *California*, 314 U. S. 219. That case rested on conflicting evidence as to a confession by the defendant. It lacked any admission of facts by demurrer or otherwise. Mention might also be made of the fact that in *Sunal* v. *Large*, 91 Adv. Ops. 1555 (No. 535 October Term, 1946) this Court merely held that habeas corpus could not be substituted for an appeal after the time for appeal had passed. It was not an error *coram nobis* proceeding and did not involve perjured testimony discovered after the time for appeal had passed.

VIII.

EXHAUSTION OF REMEDIES UNDER ILLINOIS LAW.

The first of the series of proceedings resorted to by petitioner was an appeal to the State Supreme Court from the original judgment of conviction. That appeal was unavailing and any remedy for petitioner's unlawful imprisonment available by that appeal has been exhausted.

In 1938 petitioner sought relief from imprisonment by petition for habeas corpus in the Supreme Court of Illinois. That Court denied relief without opinion. Petitioner applied to the Supreme Court of the United States for writ of *certiorari* to review that decision but this Court denied the petition for *certiorari.* Illinois therefore provides no remedy by habeas corpus. Counsel for the State of Illinois concede that point. (Brief in Opposition, p. 2, par. 3) See also the Brief in Support of Petition for *Certiorari* in the instant case, p. 40, 2nd paragraph.

Upon the discovery, in 1945, that Factor had admitted that his testimony identifying Touhy was false, petitioner filed application for writ of error *coram nobis* in the court of his conviction. On demurrer by the state and a plea of the statute of limitations the Criminal Court of Cook County, Illinois denied him relief and the Supreme Court of Illinois affirmed the judgment of the Criminal Court, holding that there was no remedy under Illinois law by *coram nobis* proceedings.

Every remedy therefore has been denied petitioner by the Illinois courts, and, having exhausted all state remedies, this petition for *certiorari* brings to this Court the undisputed proof of conviction by perjured testimony and asks for a new trial and a fair trial and the protection of

petitioner's rights under the Constitution of the United States.

We close this reply to the State's Brief in Opposition with a mere reference to the *Nierstheimer* case (see Petitioner's Brief, pp. 42-44). Here petitioner Touhy has done each of the various acts which this Court in the *Nierstheimer* case declared to be essential as a prerequisite to relief in the Federal courts for unlawful imprisonment. It was there said that petitioner Woods was not entitled to the intervention of a Federal court because he had not resorted to the remedy by error *coram nobis* proceedings in the state court. It was further declared that this Court could not then assume that the Supreme Court of Illinois would deny relief because of the statutory limitation of five years for such proceedings. The petitioner in the instant case presents a record showing that the Supreme Court of Illinois has decided the very question in the very same way which this court in the *Nierstheimer* case said it could not assume the Illinois Court would decide. Having therefore demonstrated that the petitioner has been deprived of his liberty by perjured testimony of such a character as to completely undermine the verdict, and having demonstrated also that the courts of Illinois have so interpreted Illinois law as to deprive him of any remedy in its courts, the petitioner submits his case to this Court for the vindication of his rights under the Constitution of the United States.

Respectfully submitted,

EDGAR B. TOLMAN,
THOMAS I. MEGAN,
HOWARD B. BRYANT,
30 North La Salle St., Chicago, Illinois
Attorneys for Petitioner.

October 3, 1947